after Abdul Hai had made the deposit and filed an application to have the sale set aside under the provisions of Rule 17 (XIIIA). We therefore dismiss the appeal with costs.

Appeal dismissed.

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TUHI RAM v. IZZAT ALI.

APPELLATE CIVIL.

1908 *March* 5.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

ASHARFI KUNWAR AND OTHERS (DEFENDANTS) *v.* RUP CHAND (PLAINTIFF).*

Hindu law—Adoption—Jains—Custom—Adoption of married man—Suit for declaration of invalidity of adoption—Burden of proof.

Held that according to the law and custom prevailing amongst the Jain community a widow has a power to adopt a son to her deceased husband without any special authority to that effect, and if there are two widows the senior widow may adopt without the concurrence of the junior widow. A widow is also competent, with the consent of the *sapindas*, to give a son in adoption after the death of her husband.

Held also that, adoption being amongst the Jains a purely secular institution, there is no legal objection to the adoption of a married man. *Manohar Lal* v. *Banarsi Das* (1) followed. *Chotay Lall* v. *Chunno Lall* (2), *Amava* v. *Mahadgauda* (3), *Sri Balusu Gurulingasuami* v. *Sri Balusu Ramalakshmamma* (4) and *Radha Mohan* v. *Hardai Bibi* (5), referred to.

Held also that where the plaintiff asks for a declaration that an alleged adoption is invalid, but cannot claim immediate possession by reason of the intervention of a widow's estate, the burden is still on him to make out a *primâ facie* case that the adoption challenged by him is invalid in law or never took place in fact. *Brojo Kishoree Dassee* v. *Sreenath Bose* (6) and *Sardar Singh* v. *Ram Kunwar* (7), followed. *Tacoordeen Tewarry* v. *Ali Hossein Khan* (8) referred to. *Tarinee Churn Chowdhry* v. *Sharoda Soondaree Dossee* (9), *Chowdhry Pudum Singh* v. *Koer Oddey Singh* (10), *Gooroo Prosunno Singh* v. *Nil Madhub Singh* (11) and *Har Dyal Nag* v. *Roy Krishto Bhoomick* (12) distinguished.

* First Appeal No. 32 of 1906 from a decree of Nihal Chandar, Subordinate Judge of Saharanpur, dated the 8th of November 1905.

(1) (1907) I. L. R., 29 All., 495.
(2) (1878) L. R., 6 I. A., 15.
(3) (1896) I. L. R., 22 Bom., 416.
(4) (1899) I. L. R., 22 Mad., 398.
(5) (1899) I. L. R., 21 All., 460.
(6) (1868) 9 W. R., 463.
(7) Weekly Notes, 1902, p. 62.
(8) (1874) L. R., 1 I. A., 192: at p. 206.
(9) (1869) 11 W. R., 468.
(10) (1869) 12 W. R., P. C. R., 1.
(11) (1873) 21 W. R., 84.
(12) (1875) 24 W. R., 107.

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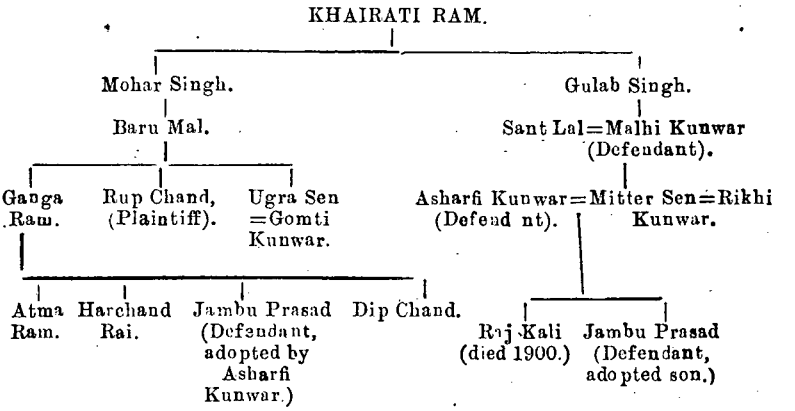
The following genealogical table indicates the relationship between the parties to this appeal :—



The parties were mahajans of the Jain sect, living at Saharanpur. Mitter Sen, who was the owner of considerable property, both movable and immovable, died in 1890, leaving him surviving two widows, Asharfi Kunwar, the senior widow, and Rikhi Kunwar, the junior widow, his mother, Malhi Kunwar, and a daughter, Raj Kali. Raj Kali died in 1900, and Rikhi Kunwar before the filing of the present suit. This suit was filed in 1904 by Rup Chand asking for a declaration that the ostensible adoption of Jambu Prasad after the death of Mitter Sen by the senior widow Asharfi Kunwar was null and void, and for the cancellation of a deed of adoption executed by Asharfi Kunwar on the 14th of April 1900. The *factum* of the adoption was not seriously questioned, but its legality was disputed on various grounds, principally upon the ground that Jambu Prasad was at the time of the adoption of the age of 23 years and already married. The court of first instance (Subordinate Judge of Saharanpur) decreed the plaintiff's claim, mainly upon the ground that no custom had been proved whereby it was lawful to adopt a married person, and that in absence of proof of a special custom, the ordinary Hindu law applied. Against this decree the defendants appealed to the High Court.

Mr. *W. Wallach*, Babu *Jogindro Nath Chaudhri*, the Hon'ble Pandit *Sundar Lal*, Pandit *Moti Lal Nehru*, Dr. *Satish Chandra Banerji* and Mr. *R. Malcomson*, for the appellants.

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Mr. *E. A. Howard*, the Hon'ble Pandit *Madan Mohan Malaviya*, Dr. *Tej Bahadur Sapru*, and Babu *Lalit Mohan Banerji*, for the respondent.

STANLEY, C.J., and BURKITT, J.:—The main question raised in this appeal is whether amongst the Jain community marriage is a bar to adoption. Several other questions have been discussed before us which also must be determined. The suit out of which it has arisen was brought by Lala Rup Chand, claiming to be the heir of Lala Mitter Sen, to have a declaration that an alleged adoption of the defendant Jambu Prasad by Musammat Asharfi Kunwar, the widow of Lala Mitter Sen never took place, and that, if it did take place, it was contrary to Hindu Law and therefore void. The plaint also contains a prayer for a declaration that a document described as a deed of adoption in favour of Jambu Prasad, dated the 14th of April 1900, executed by Musammat Asharfi Kunwar was null and void. No other relief than these declarations was claimed.

Lala Mitter Sen died in the year 1890, leaving two widows, namely, Musammat Asharfi Kunwar and Musammat Rikhi Kunwar, and also a daughter, Musammat Raj Kali, him surviving. He was possessed of immovable property of considerable value, and of movable property besides. At the time of his alleged adoption Jambu Prasad was 23 years old and a married man. Musammat Raj Kali died in the month of June 1900, and during the pendency of this litigation both Musammat Rikhi Kunwar and Musammat Asharfi Kunwar have died.

As to the *factum* of the adoption, the plaintiff did not produce any evidence whatever in support of his case that there was no adoption, contending that the burden of proving his adoption lay on the defendant. This appears from a proceeding recorded by the Subordinate Judge on the 2nd of August 1905. On the 8th of August, as appears from the record, the plaintiff stated that he had come to know of the adoption on the 14th of April 1900, and the plaintiff's pleader made a statement to the like effect, and it also appears that the plaintiff made an application to the Court in May 1905 to have a further issue added, in which the adoption of Jambu Prasad was impliedly admitted, but in which a suggestion was made that Musammat Rikhi

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Kunwar, the co-wife of Musammat Asharfi Kunwar, had also made an adoption. The issue so sought to be added was in these terms: "Whether on the day and at the time of the adoption of Jambu Prasad any other adoption was made by the second wife of Lala Mitter Sen. If so, what was its effect?" This application was, on the 13th of May 1905, directed to be filed with the record. Some evidence was as a matter of fact given incidentally by the defendants' witnesses in proof of the adoption. The learned Subordinate Judge held that it lay upon the plaintiff to give some evidence in support of his allegation that there was no adoption in fact of the defendant Jambu Prasad, and, the plaintiff having refused to give any such evidence, in the absence of such, decided the issue as to adoption in favour of the defendant. But he held upon the main question that the adoption of a married boy amongst the Jains was illegal. The validity of the adoption by a Jain of a married boy was considered by this Bench in the case of *Manohar Lal* v. *Banarsi Das* (1) in which after lengthy discussion we held upon the evidence that such an adoption was in accordance with a well established practice prevailing amongst the Jain community. In our judgment in that case we dealt with the origin of the Jain sect and pointed out how, unlike the Hindus proper, the Jains attached no religious significance whatever to adoption and rejected the restrictions in the way of adoption imposed by the Brahmanical priests. We shall treat the historical portion of our judgment in that case as incorporated in this judgment, and thus avoid a repetition of matters which are really not in dispute. Dr. *Tej Bahadur Sapru* on behalf of the plaintiff respondent contended that the onus was improperly laid upon his client of giving evidence in support of his allegation that Jambu Prasad had not been adopted, and that in any case, whether his contention in regard to this be right or wrong, an opportunity should now be given to him of making a *primâ facie* case, and that an issue as to the fact of the adoption should be referred for determination on the merits to the Court below.

As regards the legal point it appears to us that it is concluded by authority. The plaintiff, as we have said, asked the Court to

(1) (1907) I. L. R., 29 All., 495.

declare that Jambu Prasad never was adopted, and that if he was adopted his adoption was invalid. His suit was brought during the lifetime of Musammat Asharfi Kunwar, and consequently he could not and did not ask for possession of the property of Mitter Sen. It has been held that in a suit brought by the heir of a deceased Hindu for the recovery of his property against a person claiming to be the adopted son of the deceased, upon proof or admission of the heirship of the plaintiff by natural relationship, the onus lies upon the defendant to prove his adoption—*Tarinee Churn Chowdhry* v. *Sharoda Soonduree Dossee* (1), *Chowdhry Pudum Singh* v. *Koer Oddey Singh* (2), *Gooroo Prosunno Singh* v. *Nil Madhub Singh* (3) and *Har Dyal Nag* v. *Roy Krishto Bhoomick* (4). In the last mentioned case a distinction is drawn between a suit in which possession is sought and a suit in which only a declaratory decree is prayed for, and we think that such a distinction ought not to be ignored. In the case of *Brojo Kishoree Dassee* v. *Sreenath Bose* (5) in which the plaintiff sued as reversionary heir during the lifetime of the widow of his deceased ancestor for a declaration that an adoption was invalid, it was held that the onus lay on him to prove the invalidity. In delivering the judgment of the Court, Sir Barnes Peacock, C.J., observed:—"The plaintiff asked in this regular suit to have it declared that Radha Nath's adoption is invalid: it appears to us that the onus rested upon him, as it does upon any one who asks for a decree declaring the illegitimacy of another person to prove the illegitimacy. The person who asks the Court to declare that a thing is invalid is bound to prove that it is so." This ruling was followed by a Bench of this Court in the case of *Sardar Singh* v. *Ram Kunwar* (6). We know of no ruling to the contrary. The principle upon which the onus is fixed resembles that according to which a plaintiff who sues to set aside deeds is not merely bound to prove his heirship, but must give some evidence to impeach the deeds before he can throw the onus of showing a better title on the defendant: see *Tucoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan* (7). In view of the

(1) (1869) 11 W. R., 468.
(2) (1869) 12 W. R., P. C. R., 1.
(3) (1873) 21 W. R., 84.
(4) (1875) 24 W. R., 107.
(5) (1868) 9 W. R., 463.
(6) Weekly Notes, 1902, p. 62.
(7) (1874) L. R., 1 I. A., 206.

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authorities we must hold that the Court below rightly decided the issue in regard to the fact of adoption in favour of the defendant Jambu Prasad.

We are unable to accede to the application made on behalf of the plaintiff that the issue as to adoption should be re-tried and an opportunity given to the plaintiff of adducing evidence on that issue. The plaintiff's case was that the adoption did not take place, and he ought to have been prepared to give some *primâ facie* evidence at least in support of it. He could not say that he was in any way taken by surprise. The case was heard at great length. We are told that four weeks were occupied in the examination of witnesses. Some evidence was given by the defendant in proof of the *factum* of his adoption, and, as we have already said, the plaintiff admitted that he had knowledge of it. One of the witnesses for the defendant, Dhumi Chand, deposed to the adoption and stated that he himself attended the adoption ceremony. Sham Lal, another witness, also deposed that he was present at the adoption ceremony. The fact of the adoption indeed was not seriously disputed. When the Court held that the onus lay upon the plaintiff to give evidence, it was open to him then to produce his witnesses; but he refused to do so, and it would be unreasonable, we think, now to re-agitate the question. It is undesirable to send back the case to be re-tried on this issue.

The next point raised on behalf of the plaintiff was that Musammat Asharfi Kunwar could not adopt a son without the consent of her co-widow Musammat Rikhi Kunwar. One answer to this is that there is no evidence that Rikhi Kunwar did not give her consent to the adoption. But there is a further answer, namely, that according to Hindu Law a senior widow can adopt a boy without the consent of her co-widow. This is not disputed, but with strange inconsistency it is said that Hindu Law does not in all matters apply to the Jains, and that, inasmuch as both the widows inherited jointly the property of their husband, it would be inequitable to permit one widow to deprive her co-widow of her interest without her consent. But it has been held that the ordinary Hindu Law of inheritance is applicable to Jains in the absence of proof of special customs and

usages varying that law—*Chotay Lall* v. *Chunno Lall* (1) and the same rule has been applied to matters of adoption, although the reasoning on which the law is based is not wholly applicable to the Jains as no spiritual efficacy attaches in their case to adoption. See *Amava* v. *Mahadgauda* (2). In that case it was held that where the son of the owner of an estate died childless in his father's lifetime, leaving two widows, and after the father's death without leaving a widow or descendants the two widows of his son inherited his estate as his nearest *sapindas*, an adoption by the senior widow was valid, though the younger widow did not consent to it, and although the adoption divested the estate which she had inherited from her father-in-law. This case is instructive, but it must not be overlooked that the Mayukha school of law, and not the Mitakshara, prevails in Bombay. No attempt, however, has been made to prove any custom amongst the Jains at variance with the ordinary Hindu law upon this point, and, this being so, we must reject the argument which has been addressed to us by Dr. *Tej Bahadur Sapru*.

The next point raised by him was that Sona Kunwar, the natural mother of Jambu Prasad, could not give her son in adoption without the authority of her deceased husband. If the husband had been alive, it is not disputed that his wife could not have given his son in adoption but the husband being dead there appears to be no objection to the giving in adoption of his son by his widow. In the connected appeals of *Sri Balusu Gurulingaswami* v. *Sri Balusu Ramalakshmamma* (3) and *Radha Mohan* v. *Hardai Bibi* (4) it was held by their Lordships of the Privy Council on a question of adoption peculiar to the appeal from Madras that the authority of a widow in reference to adoption, not being identical in different schools of Hindu Law, it is established in Madras in regard to the giving of a boy in adoption by the widowed mother, that, unless there has been some express prohibition by the husband, the wife's power, with the concurrence of *sapindas*, where that is required, is co-extensive with the power of the husband and that the adoption of an only son is not an act so improper, but that a widow

(1) (1878) L. R., 6 I. A., 15.
(2) (1896) I. L. R., 22 Bom., 416.
(3) (1899) I. L. R., 22 Mad., 398.
(4) (1899) I. L. R., 21 All., 460.

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has power to effect it with the assent of the *sapindas* in the absence of express power from her husband. The appeal from the Allahabad High Court was from a decision of a Full Bench holding that according to the Benares school of Hindu Law the giving in adoption of an only son is sinful and to that extent contrary to the Hindu Law, but that the adoption of such a son having taken place in fact was not null and void. Dealing with this appeal, their Lordships rejected the fundamental position taken up by Mitter, J. in *Raja Upendra Lal Roy* v. *Srimati Rani Prasannamayi* (1) namely, that "the institution of adoption as it exists among the Hindus is essentially a religious institution. It originated chiefly, if not wholly, from motives of religion, and an act of adoption is to all intents and purposes a religious act, but one of such a nature that its religious and temporal aspects are wholly inseparable." They held that the doctrine thus propounded by Mitter, J. was "equally opposed to reasonable construction of the books, apart from religion, and to decided cases," and after an elaborate treatment of the law upheld the decision of this Court. We decide this question against the respondent.

Of the minor questions raised on behalf of the respondent, the last is that the Court ought to have determined the issue sought to be raised by the plaintiffs in their application of May 1905, namely, whether on the day and at the time of the adoption of Jambu Prasad any other adoption was made by the second wife of Mitter Sen, and if so, what is its effect. The answer to this is that it was not the case of the plaintiff that Rikhi Kunwar adopted any boy. On the contrary in his plaint he denied that any adoption by Rikhi Kunwar ever took place. In their written statement the defendants also denied that Rikhi Kunwar had made any adoption. The parties therefore were agreed as to this, and consequently there was no necessity to add the issues which the plaintiff sought to raise.

This brings us to the main question in the appeal, namely, whether or not amongst the Jains marriage is a bar to adoption. As we pointed out in the case of *Manohar Lal* v. *Banarsi Das* (2), the members of the Jain community are mostly engaged as

(1) (1868) 1 L. L. R., 221. (2) (1907) I. L. R., 29 All., 495.

traders and shop-keepers, and therefore we cannot expect to find records of adoptions such as are met with in the case of land-owners; proof by instances is the class of proof which ordinarily could be adduced to establish the practice of the community in regard to adoption.

We also pointed out that admittedly Jains can adopt a boy at any age, provided that he be not married, the ceremonies of tonsure and investiture with the sacred thread not being observed by them. We further pointed out that the contention advanced against the alleged practice is not that the custom amongst the Jains in regard to adoption is similar to that recognized by the Hindus of the twice born classes, but is similar to that which is binding amongst the *sudras*. In that case we held that 23 cases of adoption of married boys were proved, namely, 9 in Muzaffarnagar, 7 in Saharanpur, 3 in Delhi and 4 in Meerut, and in view of the fact that the Jain population was not large and was scattered about, we held that the number of cases proved was sufficient evidence of the legality of these adoptions. In addition to the former illustrations of the practice so proved, the defendant Jambu Prasad in this case adduced evidence in proof of the adoption of a number of other married boys, including Udai Ram, Kabul Singh and Pargash Chand in the Saharanpur district; Tilok Chand in the Muzaffarnagar district; Anup Singh, Murari Lal, Piarey Lal, Chanchal Rai, Kanhaia Lal and Sugan Chand in the Meerut district; Summan Lal and Juggi Mal in the Delhi district, and Makhan Lal in the Karnal district, as also six other instances which have not been pressed. In addition to this evidence was given on commission to prove the adoption of married boys in the Jaipur State, which borders on the Agra district. In the present case 19 of the instances which were proved to our satisfaction in the former case were also relied on, in addition to those mentioned above. As the parties to this litigation are different from the parties to the former case, we have been obliged to consider the evidence adduced in support of each alleged case of adoption, including the instances proved in the former appeal, and also the rebutting evidence, and the criticisms of the Court below upon that evidence. As to six of the instances which were not pressed, the evidence is not satisfactory, and we put them out

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of consideration. These are the cases of Behari Lal, Kanhaia Lal, Khub Chand, Radha Mal, Ishq Lal and Khushdil Prasad.

We shall first deal with the Saharanpur cases. The first case is that of Sikri Prasad, who is said to have been adopted by Mitthan Lal. One Ganga Ram, a Soraogi Agarwala Jain, deposed that amongst the Jains married as well as unmarried boys were taken in adoption; that Sikri Prasad was taken in adoption by Mitthan Lal from his natural father Murli Dhar, and that at the time of his adoption he was married, and that he (the witness) attended the adoption ceremony. He stated that Sikri Prasad was twice married, his first marriage being with a member of the family of Lala Dhum Singh and his second marriage with a daughter of Nihal Chand. He stated that he did not know if any boys other than Sikri Prasad, Jambu Prasad and Dip Chand were taken in adoption after marriage.

Another witness, Shankar Lal, of the same caste, a shopkeeper at Saharanpur, stated that he was a *chaudhri* of the Agarwala Jains and had been such for 10 or 15 years; that amongst the Jains a married boy can be taken in adoption, and that there was no restriction as to age. Then he stated that Sikri Prasad was taken in adoption by Mitthan Lal. In cross-examination he stated that Sikri Prasad was 13 or 14 years of age at the time of his adoption; that a man brought a message to his brother that Sikri Prasad was about to be adopted that day and that he should attend the ceremony, and that he (the witness) and his brother Buland Roy went to the ceremony and so he had knowledge of the adoption. He was unable to say whether Mitthan Lal's wife was alive at the time of the adoption which took place 18 or 19 years ago. The witness further stated that he attended the first marriage of Sikri Prasad which took place about 22 years ago.

Another witness, Lachman Das, also a shop-keeper, deposed that, according to custom amongst the Jains, a married as well as an unmarried boy may be taken in adoption, and he gave as illustrations the cases of Kabul Chand, Sikri Prasad, Jambu Prasad, Dip Chand and Udai Mal. Sikri Prasad, he said, was twice married, his second wife being the witness' own niece (daughter of his brother). Udai Mal, he said, was 18 at the time

of his adoption, and at the time of his marriage to the witness' niece was 26 or 28 years of age. He mentioned the name of the natural father of Udai Mal, namely, Ramanand.

Another witness, Dhumi Chand, deposed to the adoption of Sikri Prasad. He is a zamindar paying Rs. 700 or Rs. 725 as Government revenue. He stated that among the Jains married as well as unmarried boys were taken in adoption and that he had knowledge of this custom from the fact that Sikri Prasad, Lala Jambu Das (that is Jambu Prasad) Dip Chand and one Pargash Chand had been taken in adoption (that is, after marriage).

The rebutting evidence in this case is that of Govind Rai, a kanungo, residing at Kalpahar in Saharanpur. He admitted that Sikri Prasad " was kept by his paternal uncle (*i.e.*, Mitthan Lal)," but said that the ceremony of adoption was not performed. In cross-examination this witness stated that Sikri Prasad was first married to Lala Dhum Singh's daughter 25 or 26 years ago and that he attended the marriage ceremony, and that he was married a second time in the family of Baherawallas about 8 or 10 years ago. He also said that Mitthan Lal kept Sikri Prasad from the age of 6 years.

Molar Mal makes the bald statement that Sikri Mal was not adopted by any one, and Ram Prasad makes a similar statement. The last witness admitted in cross-examination that Sikri Prasad was married twice, the first marriage having taken place 20 or 25 years ago and the second marriage 11 or 12 years ago, and that both the marriages were celebrated by Murli Dhar, his natural father. He admitted that Sikri Prasad for the past 7 or 8 years had been living with Mitthan Lal and assigned as the reason for this that there was some dispute in Murli Dhar's house.

On this evidence we have no hesitation in coming to the conclusion that Sikri Prasad was adopted by his uncle Mitthan Lal when he was a married boy. The learned Subordinate Judge rejects the evidence given in support of the adoption, pointing out discrepancies in the dates assigned by the witnesses to the adoption and the marriage of Sikri Prasad. He says that " all the witnesses examined to prove this instance are men of no position," and held that the adoption was not proved, despite the fact that

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no evidence of any value was given to rebut the evidence adduced in support of it.

We do not agree with the learned Subordinate Judge that the witnesses who deposed to the adoption are men of no position. One is a cloth merchant and two others are shop-keepers, one of these, Shankar Lal, being a chief man in his district and the other being connected with Sikri Prasad through the marriage of his niece. The other witness is a well-to-do zamindar. We attach no importance to the discrepancy pointed out in the matter of dates. It is not to be expected that witnesses will remember with accuracy such matters. The criticism of the evidence by the learned Subordinate Judge in this case not unfairly represents the way in which he dealt throughout in his judgment with the evidence given in support of instances of the adoption of married boys. We do not propose to deal *seriatim* with the evidence given in support of the instances which were established to our satisfaction in the case of *Manohar Lal* v. *Banarsi Das*, but we shall refer to a few only of these instances.

Ajit Prasad, who was the natural son of one Sagun Chand, deposed to his adoption by Gurdial Singh 5 years ago. He stated that he was married 15 years ago, and that at the date of his adoption he was 25 years of age. At the time of his adoption, he said, the members of the brotherhood assembled and *laddus* were distributed, and his mother taking hold of his hand put it into the hand of Gurdial Singh.

A witness Bhagwan Das, a resident of Sarsawa, a zamindar and thekadar, deposed that among the Jains married as well as unmarried boys were taken in adoption, and that in his presence 5 or 6 married boys were adopted, namely, Ajit, *i.e.* Ajit Prasad, and Janki at Sarsawa; Parkash Chand at Nakur; Udai Ram, Jambu Prasad and Dip Chand at Saharanpur. Ajit Prasad's natural father, he said, died 7 or 8 years before his adoption by his uncle Gurdial Singh, and after his death Ajit lived with his mother at Bhuria.

Another Bhagwan Das, a resident of Sarsawa, and son of Bahadur Singh, also deposed to the alleged custom, and stated that at Sarsawa married boys, namely, Janki Das and Ajit Prasad,

had been taken in adoption. Sarsawa is in the district of Saharanpur.

The evidence of these witnesses was not contradicted. and we see no reason why credit should not be given to it.

The adoption of Janki Das, a married man, by Chajju Mal's widow is proved by the unrebutted evidence of the two persons of the name of Bhagwan Das to whom we have already referred, both deposing that they were present at the adoption. The learned Subordinate Judge rejected the evidence of these witnesses as untruthful, but we see no reason for distrusting it. An adoption is a matter of such notoriety amongst caste fellows and others living in the neighbourhood of the parties, that it is highly improbable that witnesses would come forward and depose to an adoption which had never taken place.

Another instance is that of Banwari Lal, the natural son of Lala Nagar Mal, who is said to have been adopted by Lala Bansi Lal, the brother of Nagar Mal. This adoption is proved by Jai Dayal and Yad Ram. Jai Dayal Mal is a zamindar and money-lender of the age of 70 years, paying Rs. 2,500 a year revenue and Rs. 35 income tax. He deposed that he built a Jain temple at Muzaffarnagar, and that among the Agarwala Jains a married as well as an unmarried boy is taken in adoption, and that he was aware of this from the fact that such adoptions had taken place in his time, and that of others before his time he had heard from his elders. He then mentioned two instances which had taken place within his memory at Muzaffarnagar, one being that of Banwari Lal and the other of Tilok Chand. Banwari Lal was adopted, he said, by Bansi Lal, who was the son of the witness' paternal uncle Bahadur Singh. Then he stated that Banwari Lal was married thrice, his first marriage having taken place about 50 years ago, the second about 34 years ago and the third about 17 years ago. Bansi Lal carried on a money-lending business and had property besides, and upon his death Banwari Lal, he said, took possession of it, while the estate of Nagar Mal was taken possession of by his other son Dasaundhi Ram. Then he referred to the adoption of Tilok Chand by Khairati Ram, whose daughter had been married to Tilok Chand before the adoption, and said that he (the witness) was present when the members of the

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brotherhood assembled on the occasion of the adoption of Banwari Lal, and that he also joined the marriage procession and was present at the marriage of Banwari Lal. This witness is a man of position and one to whose evidence weight should be attached. He is corroborated by Yad Ram, who deposed to the adoptions of three married men, namely, Ishq Lal, Banwari Lal and Tilok Chand, and stated that Banwari Lal was adopted at the age of 22 or 24 by Bansi Lal, that Tilok Chand was adopted by Khairati Ram at the age of 26 or 27 years, and that he knew both the adoptive fathers, being on social terms with them and visiting them on occasions of marriages. He came to know of the adoptions of Banwari Lal and Tilok Chand from Banwari Lal as well as from the members of his family, and he attended the first marriage of Tilok Chand. In cross-examination he stated that he attended the second marriage of Banwari Lal to a member of a family residing at Salawah, and that that marriage was celebrated by Bansi Lal, and that Nagar Mal and all his brothers joined the marriage procession at the time of his second marriage.

The only rebutting evidence given in this case is that of Khairati Ram. He is a brother of the plaintiff's general attorney. In his direct examination he stated that Banwari Lal's first marriage took place 35 or 36 years ago and that he attended that marriage, but upon cross-examination he was unable to state in whose family Banwari Lal was married.

The learned Subordinate Judge disbelieved the evidence of Jai Dayal Mal stating that he was a tutored witness, and he did not believe the evidence of Yad Ram. He observed that a mere perusal of the evidence will show that Jai Dayal Mal is a tutored witness. We cannot agree with the learned Subordinate Judge as to this. We can discover no sign of tutoring in his evidence. He appears to be a highly respectable member of the Jain community and a man of substance, and we see no reason why his evidence given with so much detail should be rejected.

We now pass on to the case of Juggi Mal, who is said to have been adopted by Mehr Chand. Mehr Chand is a contractor and banker and a man of position, being a Darbari of the Governor General since the year 1877. He is an Agarwala Jain, as are

all the witnesses who deposed to instances of adoption which have been established in evidence. He deposed that he built a Jain temple in Delhi and in 1879 had the *partishta* ceremony performed at the cost of 4 or 5 lakhs of rupees. He then stated that he adopted a son, namely, Juggi Mal, on 1st Magh Sudi, Sambat 1961, corresponding to 1904. Juggi Mal was in 1905 39 or 40 years of age, and his first marriage took place 23 or 24 years ago, and his second marriage was celebrated by the witness at a cost of Rs. 2,500. In cross-examination he stated that all the members of the Panchayat took part in Juggi Mal's marriage, but said that his cousin Chunni Lal wished to give his own son in adoption to the witness, but that he (the witness) did not wish to take him in adoption owing to his tender age and in consequence of this Chunni Lal dissociated himself from the Panchayat. He further stated that he consulted two or four men of his brotherhood before making the adoption and that they approved of it.

Sangam Lal also gave evidence as to this adoption, but there can be no controversy in the matter as it is one of public notoriety.

A witness for the plaintiff, Jauhari Mal, admitted that the adoption took place, but stated that the persons assembled regarded the act of taking a grown up and married boy with disfavour. This witness, who appears to be a respectable man, being a banker and treasurer of the National Bank of Upper India at Delhi, in answer to a question in cross-examination, stated that the members of the brotherhood objected to the adoption of Juggi Mal because he was of advanced age and the wife of Mehr Chand was younger than he and then he made this important admission that "there was no other objection." In the course of his evidence he also stated that he had heard that one Anup Singh was taken in adoption at Kotana, and a married boy was taken in adoption in the family of Gulab Singh Naha Singh at Meerut. It is remarkable that of the many cases of adoption of married boys of which evidence has been given in no single case has any proof been given that any caste penalty followed.

Piarey Lal, a witness for the plaintiff, stated that amongst the Agarwala Jains a married boy is not taken in adoption, but

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he admitted that Juggi Mal, a married boy, was taken in adoption by Mehr Chand. This witness is a pleader practising in Delhi. He admitted that he attended the *sagai* ceremony of Juggi Mal, so that he was not seriously offended by the fact of Juggi Mal's adoption.

Isbri Prasad, an Honorary Magistrate and also Government Treasurer at Delhi, deposed that, so far as he remembered, no married boy, except the boy adopted by Mehr Chand, was taken in adoption in Delhi. He stated his opinion that the adoption of a married boy or a grown up boy was not proper and said that he did not approve of it. He stated that the Panchayat of Delhi had not made any rule to the effect that a married boy should not be taken in adoption. It was proposed, he said, that a Panchayat should be held in connection with the adoption made by Mehr Chand, but that such had not been held as there was no leisure and the matter was not considered to be of great importance. It is clear from this evidence that the members of the brotherhood in Delhi did not regard the adoption of a married boy as obnoxious to any rule governing the Agarwala Jains, though they personally did not approve of the practice.

The learned Subordinate Judge treated this case as proved, but considered it a breach of the rules of caste or of law, and cited from a report this passage:—"Occasional breaches of general rules of caste or law do occur, but a few modern breaches of such a rule do not constitute an ancient and invariable custom." He treated this adoption as simply a case of the breach of the law or of usage.

We shall pass over the other instances which were established to our satisfaction in the case of *Manohar Lal* v. *Banarsi Das* with this observation that we have carefully considered the evidence which has been laid before us and the criticisms passed upon it and we see no reason for coming to a different conclusion from that at which we arrived on the evidence furnished in that case.

Evidence in proof of 13 additional instances has been laid before us in this appeal, not including evidence of adoptions of married boys in the Jaipur State, namely, two in the Saharanpur district, one in the Muzaffarnagar district, 6 in the Meerut district,

2 in the Delhi district and one in the Karnal district. The first is that of Udai Ram, said to have been adopted by Banwari Lal. Lachman Das, to portion of whose evidence we have already referred, said that he was aware of the adoption of married boys and gave as an instance the case of Udai Mal and others. Udai Mal (also called Udai Ram), he stated, was taken in adoption by Banwari Lal at the age of 18 and lives near the witness' house in Mohalla Yadgar in Saharanpur. The name of his natural father was Ramanand, who was brother of Banwari Lal. Ramanand, he stated, left 3 sons, the eldest being Ajudhia Prasad, the second Chhamman Lal and the third Udai Mal. Udai Mal was taken in adoption, he stated, perhaps 12 or 13 years ago and was married 20 years ago after the death of Ramanand.

Bhagwan Das, to whose evidence we have also referred, deposed that married as well as unmarried boys were taken in adoption, and mentioned the adoption of two such boys at Sarsawa, and then stated that two other married boys had also been taken in adoption, namely, Udai Ram who was taken in adoption by Banwari Lal, and the other Pargash Chand, who was taken in adoption by Kishori Lal. In cross-examination he gave the name of Ramanand as the natural father of Udai Ram, and stated that Udai Ram was taken in adoption 18 or 20 years ago.

Then we have the evidence of the other Bhagwan Das, the son of Govind Rai, who mentioned the name of Udai Ram as one of a number of married boys who were taken in adoption at Saharanpur. Udai Ram, he said, was taken in adoption by Banwari Lal some 14 or 15 years ago. His partner, he said, was related to Banwari Lal. The only rebutting evidence is that of Morah Mal and Ram Prasad. The former deposed that "no one adopted Udai Mal in my presence." In cross-examination he said that he never attended any adoption ceremony at Saharanpur or outside of Saharanpur, and that Udai Mal was not a friend of his nor was he on visiting terms with him. Further, pressed as to how he knew that Udai Mal had not been adopted by anyone, he stated that he had heard that such was the case. He knew nothing of Udai Mal's

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age or of his marriage, and it is quite evident that he knows nothing whatever about him. His evidence is worthless. Ram Prasad's evidence is equally valueless. He deposed that Udai Mal was not adopted by anyone. On cross-examination as to how he knew this his answer was:—"Invitations are sent out when a ceremony takes place in the brotherhood. Hence I say that Udai Ram was not adopted." He admitted that he had no relationship with Ramanand the father of Udai Ram or with Banwari Lal. It is therefore unlikely that he would have received an invitation to the adoption ceremony. Although the evidence in support of this adoption is not strong, we see no reason for distrusting it. Bhagwan Das, the son of Gobind Rai, was actually present at the adoption, if his evidence be true. He is a man in a fairly good position of life, and we do not think that we ought to reject his testimony.

The next instance is that of Kabul Singh (also called Kabul Chand) said to have been adopted by the widow of one Raghu Mal. Shankar Lal, a Chaudhri of the Agarwala Jains in Saharanpur, who has already been mentioned, deposed to this adoption. He stated that he heard that Kabul Singh had been taken in adoption by Raghu Mal 20 or 21 years ago, and he was aware that Kabul Singh was during his life in possession of the property of Raghu Mal, and that his sons are now in possession of it. The importance of this evidence is that Kabul Singh, who was the natural son of Nanhu Mal, acquired the property of Raghu Mal on his death and remained in possession of it up to the time of his own death. If he had not been adopted by Raghu Mal, he would not have got his property. Lachman Das, who was related to Kabul Singh, the latter being a grandson of his aunt, deposed that Kabul Singh was adopted by the wife of the paternal uncle of Nanhu Mal, namely, Raghu Mal, and that his marriage was performed by Nanhu Mal, and that at the time of his adoption he was 28 or 30 years of age. The adoption, he said, took place about 20 or 21 years ago, and Kabul Singh had been married 27 or 28 years ago. This witness from his relationship would be certain to know of the adoption if it took place; and in view of the fact that the evidence in support of the adoption stands unrebutted, we see no reason why we should not accept it. The

only point which the plaintiff made against the adoption was that in the will of Raghu Mal, Kabul Chand is described as the son of Nanak Chand, his natural father, but there is nothing in this point, seeing that the will was executed before the date of the alleged adoption, namely, on the 27th of November 1883. Now we do not expect in a case where instances of adoptions are being proved that all possible evidence as to each adoption should be exhausted. If such were required, it would be beyond the means of litigants to establish their suits, so costly would be the prosecution of them. The evidence must be such, however as would ordinarily satisfy an unprejudiced mind beyond reasonable doubt that the adoptions alleged did take place.

Another instance is that of Parkash Chand, who is said to have been taken in adoption after marriage by the wife of Kishori Lal at Nakur. The two witnesses named Bhagwan Das deposed to this adoption, but neither of them appears to have attended the adoption ceremony. One of them says that he heard of the adoption at the Tahsil office at Nakur and also at the house of Daya Chand, three or four years before his examination; that there were some people congregated at the place who were speaking on the subject, and in answer to a question put by him stated that the wife of Kishori Lal had taken Parkash Chand in adoption and they said that he had already been married. The evidence of the other Bhagwan Das is also hearsay and of little value. Dhuni Chand, a zamindar residing at Saharanpur, deposed that Parkash Chand was taken in adoption about six years ago by the wife of Kishori Lal. Sangam Lal, a commission agent, resident of Ambetha, mentioned a number of adoptions of married boys, and amongst others that of Parkash Chand, with whom he was acquainted. The evidence in support of this adoption is weak, but the fact of the adoption is not denied. The only matter which is denied is that Parkash Chand had been married before his adoption. Gobind Rai, a witness for the plaintiff, deposed that he knew Parkash Chand, and that he was adopted by Kishori Lal, but that he was married after Kishori Lal's death and that his marriage was celebrated by Kishori Lal's widow. The adoption, he said, took place more than 7 years and 4 or 5 months ago. We think

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the weight of evidence establishes that Parkash Chand was adopted by the widow of Kishori Lal and not by Kishori Lal himself, and that his marriage took place before his adoption.

The next instance is that of Tilok Chand, who is said to have been adopted after marriage by Khairati Ram. Khairati Ram himself deposed to this adoption. He is a zamindar and money-lender, residing at Muzaffarnagar, and pays Rs. 700 or Rs. 800 annually as Government revenue and is the manager of a Panchayati temple and president of the panchayat at Hastinapur. He deposed that his daughter was married to Tilok Chand 14 years ago, and that he has since adopted him and celebrated his second marriage. The adoption took place, he said, two years ago, three or four months after the death of the witness' daughter. In cross-examination the witness stated that a deed of adoption was executed and was attested by Ram Sukh Das. Two witnesses, Jai Dayal Mal and Yad Ram, corroborated the evidence of this witness. To portion of Jai Dayal Mal's evidence we have already referred. As regards the adoption of Tilok Chand he stated that Tilok Chand was adopted by Khairati Ram and that before the adoption he had been married to Khairati Ram's daughter. The adoption took place, he said, a little less than two years ago. The witness was not present at the adoption, but merely heard of it from Khairati Ram, so that his evidence is not of much value. Yad Ram, who was acquainted with Khairati Ram and Tilok Chand and is on social terms with them, deposed that Tilok Chand was adopted by Khairati Ram at the age of 27 or 28 years, but he admitted that he only knew of this adoption from conversations with Banwari Lal as also with members of his family, but he attended the first marriage of Tilok Chand. He also had conversations with Tilok Chand about his adoption. The only rebutting evidence is that of Mitter Sen, who denied that Khairati Ram took any boy in adoption, but in cross-examination admitted that he had heard that Khairati Ram kept his son-in-law, though he did not perform any ceremony. The learned Subordinate Judge in dealing with the evidence of Jai Dayal Mal said that "he had not the courage to say that the adoption was made in his presence," that is, he had not the courage to tell a falsehood. The adoption did not take place in his presence and therefore

he did not assert that it did. He had, we might say, the courage to be truthful. The learned Subordinate Judge did not consider that this instance was satisfactorily proved, and assigns a number of reasons for the conclusion at which he arrived, but we are wholly unable to agree with him. We think that the evidence of Khairati Ram is truthful and it of itself is quite sufficient to prove the instance.

We now come to Anup Singh, who is said to have been adopted by the widow of one Murari Lal 9 years ago. Anup Singh, who is a zamindar and money-lender himself gave evidence and deposed that he was adopted by Musammat Chameli, the widow of Murari Lal, who was his own brother, 8 months after the death of Murari Lal. He said that he was first married at the age of 12 years and that his second marriage took place "after his adoption, about 9 years ago, when he was 25 years old." He gave as a reason for his second marriage that he had no issue by his first wife, who was still living, as was also his natural father Banarsi Das, who lived at Sampat in the district of Delhi. His father, he said, gave him in adoption. Then he said he was in possession of the zamindari property of Murari Lal as also of money in deposit and Government Promissory Notes of the value of about 3 lakhs of rupees; that he had an income of Rs. 8,000 a year from the property, and that he paid Rs. 150 per annum income tax on account of the estate of Murari Lal. After his adoption, he said, Sultan Singh and Umrao Singh brought a suit against him, disputing, we presume, his adoption, and this suit was compromised, he getting the entire property of Murari Lal, but giving Rs. 29,000 to Umrao Singh. This litigation arose in this way. Sheo Singh Rai, Ishq Lal and Dilpat Rai were three brothers. Sheo Singh adopted Nihal Singh and Sultan Singh and Multan Singh were Nihal Singh's sons. Ishq Lal adopted Murari Lal, the husband of Musammat Chameli, and Musammat Chameli adopted Anup Singh. Umrao Singh was the adopted son of Dalpat Rai.

If the adoption of Anup Singh was not valid, Umrao Singh as the heir of Murari Lal was entitled to his estate. The learned Subordinate Judge rejected the proof of adoption in this case on the ground that Anup Singh compromised the suit with Umrao Singh and gave him Rs. 29,000. But there does not appear

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to us to be much force in his criticism. In view of the fact that the estate in dispute was of the value of 3 lakhs, we think that Anup Singh possibly acted prudently in avoiding protracted litigation by the payment which he made to Umrao Singh of a sum equivalent to less than one-tenth of the value of the estate at stake, particularly too as Umrao Singh was, according to the Subordinate Judge, a man of no position. The important fact is that the validity of the adoption was accepted and that Anup Singh by virtue of it acquired the property of Murari Lal. Anup Singh further deposed that when he was adopted the members of the brotherhood assembled and *laddus* were distributed. His evidence is corroborated by that of Jugul Kishore and Shiam Lal.

Jugul Kishore stated that Anup Singh was taken in adoption by the wife of his brother Murari Lal when he was about 28 or 30 years old, and that this adoption took place in his presence and was publicly known. Shiam Lal deposed that he also was present at the adoption which took place in the village of Katana. No evidence was given to contradict these witnesses. The plaintiff's witness Jauhari Mal indeed supported them. He stated that he heard of the adoption of Anup Singh at Katana. In cross-examination this witness said that he had never been present at the adoption of a married boy, but in answer to the question :—"Is there any harm, if the boy taken in adoption belongs to the brotherhood and is younger than the adoptive father and the adoptive mother?" he replied :—"I did not see a married boy taken in adoption. Otherwise there is no harm in taking a young boy in adoption." This witness, as we have already pointed out, is a man in a good position, being a banker and treasurer of the National Bank of Upper India at Delhi. The evidence satisfies us beyond any doubt that Anup Singh was adopted after marriage.

The next instance is that of Murari Lal, who is said to have been adopted by the widow of one Nand Ram. His adoption is proved by Jugul Kishore. He deposed that amongst the Jain Agarwalas a married boy is taken in adoption, and as illustrations he referred to the adoptions of Anup Singh, Murari Lal and Mitthan Lal, all of whom were married before their adoptions. Murari Lal was taken in adoption, he said, at Baraut where he (Jugul Kishore) resides and the adoption took place in his

presence. Questioned as to how he came to know that Murari Lal was married, his answer was that when he was adopted his wife accompanied him. The only rebutting evidence in this case is that of Bhagwant Rai, who made the bald statement that Nand Lal's widow did not adopt anyone. In cross-examination he admitted that he had no friendship with Murari Lal, who was 23 or 24 years old, and he was unable to state how many times he was married. He also said that he must have been married, but he was not aware of the marriage, and that Nand Lal's wife did not appear before him. It is clear that this witness has no knowledge whatever of the family. We see no reason for rejecting the evidence of Jugul Kishore, as did the learned Subordinate Judge, on the ground that neither the natural father or adoptive mother of Murari Lal was examined, and that the evidence of Jugul Kishore was not reliable. Jugul Kishore is a man of substance, holding zamindari property and being also engaged in money dealings. He pays Rs. 136 odd income-tax and gets over a thousand rupees in annual profits from his zamindari. We see no reason for distrusting his evidence.

The adoption of Behari Lal by the widow of one Jawahir Lal, that of Kanhaiya Lal by Salig Ram's widow, and of Sujan Chand by Amir Chand are proved by the uncontradicted evidence of Shiam Lal, a resident of Meerut. He deposed that married as well as unmarried boys were adopted, and that the custom had been in vogue since the time of his ancestors, and that he had heard of it from them. He himself attended at the adoptions of 8 or 10 married boys, and amongst others the adoption of Behari Lal by the widow of Jawahir Lal, the adoptive mother, who belonged to witness' family, she being his paternal grandmother. He stated :—" In my family at Binauli my paternal grandmother, who was the wife of Jawahir Lal, adopted Behari Lal." And then he proceeded to say that in addition to this adoption the wife of Mohan Lal adopted Chanchal Rai in Mauza Haldwari and in the same Mauza the wife of Salig Ram adopted Kanhaiya Lal. Then he refers to several other similar adoptions, and amongst others to that of Sujan Chand in Baghpat by Amin Chand Seth. Sujan Chand's adoption, he said, took place a little more than 40 years ago. In cross-examination

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this witness stated that Sujan Chand was the nephew of Amin Chand. He also said that he (the witness) attended the marriage of, amongst others, Behari Lal, who was adopted after his marriage. Now adoptions are matters more or less of public notoriety, and we find it hard to believe that evidence such as that given by Shiam Lal was fabricated for the purposes of this case. He was cross-examined at very great length, but was in no respect shaken. The learned Subordinate Judge rejected the proof in these cases, as the evidence of Shiam Lal was not corroborated. As regards Behari Lal he pointed out that he got possession of his alleged adoptive mother's property after her death, and remarked that, as she inherited this property from her husband, Behari Lal, if he was adopted by her, ought to have at once got possession of it. As to this we may remark that, according to our experience, out of respect, if for no other reason, a son, whether he be an adopted son or a natural son, frequently permits the property of the deceased husband, his father, to be recorded in the name of and enjoyed by his widow for her life. We attach no importance therefore to the fact that Jawahir Lal's widow remained recorded as the owner, but we do attach importance to the fact that Behari Lal is now in possession of the property, to which he could have no claim unless as an adopted son.

We now come to the case of Samman Lal, who is said to have been adopted after marriage by Sukhanand. This instance is proved by Samman Lal himself. He is a shopkeeper at Delhi. He deposed that he was adopted by Sukhanand about 25 or 26 years ago after his marriage, which took place 30 years ago. His real father Patar Chand, he said, celebrated his marriage. In cross-examination he stated that Patar Chand and Sukhanand were brothers, that Patar Chand died 2 years ago, while Sukhanand died 13 years ago. His natural mother was, he said, still living. Sukhanand and Patar Chand were separate in business and their property was separate. The evidence of this witness is uncontradicted and we see no reason for distrusting it.

The next instance is that of Makhan Lal, who is said to have been adopted by Mangal Sen. The only evidence

in support of this adoption is that of Makhan Lal himself, but his evidence is also uncontradicted. Makhan Lal is a road contractor. He is upwards of 50 years of age. He stated that his natural father's name was Chhatar Mal and that he is the adopted son of Mangal Sen. He was adopted, he said, 30 years ago when a married man, his marriage having taken place 40 years ago. In cross-examination he stated that his first son was born before his adoption and his second son was alive and was 24 years of age at the time of his examination. We have in addition to these instances the adoption of Mul Chand by Musammat Kishen Dei, the widow of one Ganesh Lal, which was proved to our satisfaction in the case of *Manohar Lal* v. *Banarsi Das*.

These exhaust the instances which have been relied on in addition to those proved in the case of *Manohar Lal* v. *Banarsi Das*. We have only now to deal with a few cases coming from the Jaipur State.

It would appear from the judgment that the pleader for the defendant in argument placed no reliance on these cases, but the evidence was relied on for the appellant before us, and was read to us, and we think that it has some value as showing that the Agarwala Jains in the Jaipur State, which borders upon the Agra district, adopt married men. Bachu Lalji described himself as the adopted son of Lala Ram Chanderji of Jaipur State. His natural father's name was Dhannua Lal. He deposed that married boys belonging to the family were adopted amongst the Agarwala Jains, and that there was no age-limit. He stated that the tying of a turban on the head of the person who is to be adopted was equivalent to an adoption. He himself was 30 years old and a married man when the turban was tied on his head in token of his adoption.

Another Lala Bachu Lalji, the adopted son of Lala Debi Lalji of the same State, also deposed to the practice of adoption amongst the Jains. He stated that his natural father's name was Sheobakhsh; that Debi Lalji by whom he was adopted was Manay Ram's son; that in his family married boys were adopted. Lala Lalji Mal also deposed that married boys were adopted amongst the Jains, and that he was adopted by Mangal Lalji after his marriage, as were also two persons of the name of Basanti Lal

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and Gopi Lal. Lala Kishori Chandji deposed that Jain Agarwalas and Bishnus both adopted married and unmarried boys, and there was no limit to age. He himself was adopted by Lala Chhote Lalji. He stated that Bachu Lal, Chait Mal and Baijnath Chaudhri were adopted after marriage; that Bachu Lal was adopted when he was 25 years old, Chait Mal when he was 30 years old and Baijnath when he was 45 years old. The witness attended, he said, the adoption ceremony of Baijnath. Another witness, Lala Sobha Lalji, deposed to the same practice, and stated that he himself was adopted after his marriage by his paternal uncle Govind Ram and that he became the owner of Govind Ram's property. He also deposed to the adoptions of Bachu Lal by Debi Lal and Makhan Mal by Narsingh Lal after their marriages. The ritual of adoption amongst these Jaipur Jains is unlike that which prevails amongst the Jains in this Province. According to the evidence of these witnesses it consists of the tying of a turban on the head of the adopted boy. The fact, however, that amongst Agarwala Jains in the Jaipur State marriage is no bar to adoption is suggestive as showing that amongst them the restrictions imposed by the Brahmanical priests and prevailing amongst Hindus proper are not regarded as binding upon that branch of the Jain community.

Not including the Jaipur instances, we have thus established to our satisfaction upwards of 30 instances of the adoption of married boys amongst the Jains in the Saharanpur, Muzaffarnagar, Meerut, Delhi and Karnal districts. The evidence given in support of 16 of these instances is unrebutted, in 13 instances the adopted sons themselves gave evidence in proof of their adoption and showed that they had got the property of their adoptive fathers. In five instances either the adoptive or the natural father gave evidence in support of the adoption.

The proof in some instances is stronger than in others—but we think that in all, with the exception of those which we have rejected as not satisfactorily proved, it is sufficient to satisfy an unprejudiced mind beyond reasonable doubt.

The number of instances so proved is remarkable in view of the smallness of the Jain population in this Province. Ordinarily unmarried boys would be selected for adoption, the choice of

a married boy being the exception. We pointed out in *Manohar Lal* v. *Banarsi Das* that there is no restriction in the matter of age to be found in Manu or the Smritis, and that the adoption of a married man of whatever age is not forbidden by the Mitakshara, and that there is no religious significance attached by the Jains to adoption. It is not the case of the plaintiff respondent that the rules of orthodox Hindus in the matter of adoption are applicable to the Jains. This case could not be set up, seeing that the ceremonies of investiture with the sacred thread and of tonsure are unknown to the Jains, and that adoptions with the Jains are purely secular matters, while with the Hindus proper they have a religious significance. As we have pointed out, their Lordships of the Privy Council exposed the infirmity of the fundamental proposition laid down by Mr. Justice Mitter that the institution of adoption was an essentially religious institution. We have shown that in several respects the practice prevailing amongst the Jains as regards adoption materially differs from that of Hindus proper. For example, it has been held that amongst them a widow is competent to adopt without the sanction of her husband—*Maharaja Govind Nath Ray* v. *Gulab Chand* (1). In *Sheo Singh Rai* v. *Dakho* (2) it was held that a sonless widow can adopt a son without the authority of her husband. In *Lakhmi Chand* v. *Gatto Bai* (3) the authority of a Jain widow to make a second adoption on the death of the child first adopted was established. Again, it has been held that a Jain widow may adopt a daughter's son. In Bombay indeed it was held that according to the Hindu Law in force in that presidency the adoption of a married asagothra Brahman was not prohibited—*Dharma Dagu* v. *Ram Krishna Chimnaji* (4). It is only when we come to comparatively modern works, such as the Dattika Mimansa and Dattika Chandrika, that we find restrictions imposed on adoption. These restrictions were undoubtedly the work of the Brahmanical priests of later times. Their Lordships of the Privy Council in the case of *Radha Mohan* v. *Hardai Bibi*, to which we have already referred, pointing to the antiquity of the Smritis as compared with the

(1) (1833) 5 S. D. A., 276.
(2) (1878) I. L. R., 1 All., 688.
(3) (1886) I. L. R., 8 All., 319.
(4) (1885) I. L. R., 10 Bom., 80.

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Dattika Mimansa and Dattika Chandrika observe that they "had occasion in a late case to dwell upon the mixture of morality religion and law in the Smritis—*Rao Balwant Singh* v. *Rani Kishori* (1). They had to decide whether a prohibition or alienation of property away from a man's family, certainly based on religious grounds, had a purely religious or also a legal bearing." They then said:—"All these old text books and commentaries are apt to mingle religious and moral considerations not being positive laws with rules intended for positive laws. In the preface to his valuable work on Hindu law Sir William Macnaghten says:—'It by no means follows that because an act has been prohibited it should therefore be considered as illegal. The distinction between the *vinculum juris* and the *vinculum pudoris* is not always discernible.' They now add that the further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality and law, lest foreign lawyers accustomed to treat as law what they find in authoritative books and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society and impart to it an inflexible rigidity never contemplated by the original law-givers.' This is weighty and suggestive language. Again, treating of the weight to be attached to the Dattika Mimansa and Dattika Chandrika, their Lordships at page 474, referring to the view expressed by Knox, J., that the authority of these works was open to examination, explanation, criticism, et cetera, while not accepting this view, observe that "so far as showing that caution is required in accepting their glosses where they deviate from or add to the Smritis, their Lordships are prepared to concur with the learned Judge." Now in view of the fact that the Jains dissented from Hinduism more than 2½ centuries ago, at a time when, so far as the authorities go, no trace of the restriction of marriage existed in the matter of adoption, and seeing that in primitive times the practice of adoption had no

(1) (1898) L. R., 25 I. A., 54, at p. 69.

religious basis; also in view of the fact, which is admitted, that the practice of adoption amongst the Jains is necessarily unlike that observed amongst the Brahmans and Vaishiyas, as we have already pointed out, it might be thought that the onus of proving the existence of a restriction upon adoption in the case of the Jains such as prevails amongst Hindus proper lay upon the party making this assertion. In view, however, of the ruling of their Lordships of the Privy Council that in Jain cases it rests on the party alleging a custom or practice at variance with that of orthodox Hindus to prove his allegation, we have treated this burden as one which lay upon the defendant appellant. This onus he has, in our judgment, satisfied, and we remain of the opinion which we expressed in *Manohar Lal* v. *Banarsi Das* that the marriage of a Jain is no bar to his adoption.

We therefore allow the appeal. We set aside the decree of the Court below and give a declaration that Jambu Prasad was adopted by Musammat Asharfi Kunwar and that his adoption is valid, and we dismiss the plaintiff's suit with costs in both Courts.

Appeal decreed.

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March 11,

Before Mr. Justice Aikman and Mr. Justice Karamat Husain.

RAM DIN (DEFENDANT) *v.* BHUP SINGH AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, section 43—*Usufructuary mortgage—Suit for redemption—Subsequent suit to recover surplus profits—Act No. XV of* 1877 (*Indian Limitation Act*), *Schedule II, Article* 105—*Act No. IV of* 1882 (*Transfer of Property Act*), *section* 92.

In a suit for redemption of a usufructuary mortgage the mortgagor is bound to claim for surplus profits, if any, payable by the mortgagee. Section 43 of the Code of Civil Procedure is a bar to the recovery of such profits by means of a separate suit.

Article 105 of the second schedule to the Indian Limitation Act, 1877, applies to a case where the mortgagor gets possession otherwise than by means of a suit for redemption.

Vinayak Shivrao Dighe v. *Dattatraya Gopal* (1), *Rukhminibai* v. *Venkatesh* (2), *Satyabadi Behara* v. *Harabati* (3), *Kashi* v. *Bajrang Prasad* (4) and *Baloji Tamaji Pothar* v. *Tamangouda* (5) referred to.

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* First Appeal No. 30 of 1907, from an order of C. D. Steel, District Judge of Shahjahanpur, dated the 5th of January 1907.

(1) (1902) I. L. R., 26 Bom., 661.
(2) (1907) I. L. R., 31 Bom., 527.
(3) (1907) I. L. R., 34 Calc., 223.
(4) (1907) I. L. R., 30 All., 36.
(5) (1869) 6 Bom., H. C. Rep., A. C. J., 97.

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THE facts of this case are as follows :—

The plaintiffs were usufructuary mortgagors. They brought a suit for redemption on the ground that the mortgage debt had been satisfied from the profits of the property mortgaged, but in that suit they did not claim any surplus profits. They obtained a decree for redemption on the 13th of May 1906, without payment, on the finding that the mortgage had been satisfied as alleged in 1280 Fasli, and in execution of that decree they got possession of the mortgaged property.

Thereafter the suit out of which this appeal arose was brought by the plaintiffs mortgagors to recover excess profits realized by the defendant after the satisfaction of the mortgage debt and before redemption. The Court of first instance (Subordinate Judge of Shahjahanpur) dismissed the suit, holding that it was barred by the provisions of section 43 of the Code of Civil Procedure. On appeal by the plaintiffs the District Judge held that section 43 was no bar to the suit, and remanded the case under section 562 for trial on the merits. From this order the defendant appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant.

The Hon'ble Pandit *Madan Mohan Malaviya*, for the respondents.

AIKMAN, J.—This is an appeal from an order of the learned District Judge of Shahjahanpur remanding a case under the provisions of section 562 of the Code of Civil Procedure.

The plaintiffs, who are respondents here, brought a suit against the appellant in a Munsif's Court for redemption of a usufructuary mortgage. They obtained a decree and were put in possession of the mortgaged property on the 13th of March 1906. They subsequently brought the suit out of which this appeal arises to recover from the appellant Rs. 5,000 on account of surplus collections alleged to have been received since 1874, when the mortgage debt was discharged by the usufruct of the property. The suit was filed in the Court of the Subordinate Judge. It was dismissed by him on the ground that it was barred by the provisions of section 43 of the Code of Civil Procedure. On appeal by the plaintiffs the learned District Judge held that the suit was not barred and remanded it for decision on the merits. It is against

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Aikman, J.

that order of remand that the defendant has preferred this appeal.

In my opinion the appeal must be allowed. The learned District Judge has written a careful judgment, but I cannot agree with the conclusion at which he has arrived. He says:—"The cause of action on the 17th of December 1904, the date of the institution of the case in the Munsif's court, was the retention of the property. The whole claim which the plaintiff was entitled to make then on that cause of action was to say:—'Give me possession of the property'." This is a view which I cannot accept.

The plaintiff had another remedy, which he was not only entitled to sue for but bound to sue for in the previous suit, and that was to have an account taken and a decree passed for any surplus received by the mortgagee after discharge of the mortgage debt. As remarked by Jenkins, C. J., in *Vinayak* v. *Dattatraya* (1), "a redemption suit has for its purpose the complete adjustment of the rights of the parties, and the decree when properly framed provides for matters even up to the time when it is ultimately carried into effect."

The decisions in *Rukhminibai* v. *Venkatesh* (2), *Satyabadi Behara* v. *Harabati* (3) and *Kashi* v. *Bajrang Prasad* (4) are also in favour of the appellant, and we have not been referred to any case in which a suit like the present has been held to be maintainable. In the case of *Rukminibai* v. *Venkatesh* (2) the subsequent suit of the mortgagee was held to be barred either under section 13 or section 43 of the Code of Civil Procedure. Section 13 will not apply to this case, as the Court which tried the previous suit was not a Court competent to try the present suit; but the provisions of section 43 are sufficient to bar this suit.

The learned District Judge in support of the conclusion to which he came relies on article 105 of the second schedule of the Limitation Act, which prescribes a period of limitation for a suit by a mortgagor after the mortgage has been satisfied to recover surplus collections received by the mortgagee, and gives as the time from which the period begins to run the date when the mortgagor re-enters on the mortgaged property. In my opinion

(1) (1902) I. L. R., 26 Bom., 661.
(2) (1907) I. L. R., 31 Bom., 527.
(3) (1907) I. L. R., 34 Calc., 223.
(4) (1907) I. L. R., 30 All., 36.

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this article must not be construed so as to conflict with the provisions of section 43 of the Code of Civil Procedure, and must be deemed to refer to cases in which the mortgagor has got possession of the mortgaged property otherwise than by means of a suit for redemption.

For the above reasons I would allow the appeal with costs.

KARAMAT HUSEIN, J.—The facts which led up to this appeal are that a suit for redemption (No. 591 of 1904) was brought in the Court of the Munsif of Shahjahanpur. The plaintiffs in that suit did not claim any surplus collections made by the mortgagee in possession, nor did they obtain any permission to bring a separate suit for such collections. They got possession of the property in execution of the decree for redemption on the 13th March 1906, without any payment, as it was found that the mortgage debt had been satisfied from the profits of the mortgaged property before 1280 Fasli. On the 1st of May 1906, the plaintiffs brought a suit for the recovery of the excess profits realized by the defendant after the satisfaction of the mortgage money and before redemption. One of the pleas in defence was that section 43 of the Code of Civil Procedure barred the suit. The Court of first instance, accepting the plea, dismissed the suit. On appeal by the plaintiffs the learned District Judge set aside the decree of the first Court and remanded the case under section 562 of the Code of Civil Procedure. The lower appellate Court came to the conclusion that section 43 of the Code of Civil Procedure did not bar the suit and that the cause of action for the surplus arose subsequently to that for redemption and was a distinct cause of action. The defendant has appealed to this Court. It is argued on his behalf that the cause of action for surplus profits in a redemption suit is not separate from the cause of action for the recovery of the possession of the property mortgaged and that the mortgagor in such a suit has only one single cause of action against the mortgagee in possession. This contention, I am of opinion, is perfectly sound. The comprehensive character of suits relating to mortgages and the obligation incumbent on litigants to see that the decree in them covers all rights is well known—*Vinayak* v. *Dattatraya* (1)—and a

(1) (1902) I. L. R., 26 Bom., 661, at p. 668.

mortgagor in a redemption suit has not only to claim possession, where the mortgagee has it, but he has also to claim surplus collections if any. His cause of action in a redemption suit is a single cause of action, and a demand for the excess collections, if any, forms an essential part of his whole claim in respect of that cause of action, and hence, if the plaintiff in a redemption suit succeeds, the Court has to pass a decree, ordering that an account shall be taken (section 92 of the Transfer of Property Act). Regarding the principle already stated, the learned Judges in the case of *Baloji* v. *Tamangouda* (1) remark :—"In this case the plaintiff, who claims under the mortgagor, sues to recover over-payments on account of a mortgage which has been redeemed. We are of opinion that the claim which arose out of the cause of action when the suit for redemption was filed was that the plaintiff, the mortgagor, was entitled, first, to recover possession of the mortgaged property on the ground that the mortgage had been satisfied out of the rents and profits received by the mortgagees, and, secondly, to get back any sum overpaid, and that therefore, the first suit should have claimed both possession and the surplus as required by section 7 of the Code of Civil Procedure, which provide that 'every suit shall include the whole of the claim arising out of the same cause of action.' The proper decree would have been to order payment of the surplus, on the ground that the mortgagees were trustees of the mortgagor and that the money in their hands belonged to them."

There in fact may be suits for redemption in which a demand for a surplus directly flowing from a settlement of accounts may be *co-extensive* with the *whole* claim of a mortgagor in respect of his cause of action to redeem. The right to claim the surplus profits is synchronous with the right to claim possession of the mortgaged property, and to hold that the cause of action for claiming excess collections accrues when the mortgage debt has been satisfied is inconsistent with the principles on which the law of redemption is based.

The question of accounts in a redemption suit must not be mixed up with the question of mesne profits in a suit for the recovery of immovable property against a trespasser, for the

(1) (1869) 6 Bom., H. C. Rep., A. C. J., 97, at p. 99.

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position of a mortgagee in possession is very different from that of a trespasser. The possession of the mortgagee before redemption is possession for the mortgagor and he "becomes a trustee for the mortgagor after he has been paid." (Ashburner on Equity, p. 258). He has, therefore, to deliver possession of the mortgaged property and to "account for his gross receipts from the mortgaged property" (section 76 of the Transfer of Property Act). The possession of a trespasser is of an adverse nature and section 44 of the Code of Civil Procedure shows that the cause of action for mesne profits is distinct from that for the recovery of immoveable property. In India "the policy of the law has been to allow a plaintiff to enforce a claim for possession of land and for mesne profits, either in one suit or two as he might think proper, but at the same time to induce him, if there is no reason to the contrary, to dispose of his whole claim in one suit only." *Kishori Lal Roy* v. *Sharut Chunder Mozumdar* (1) quoted with approval in *Lalessor Babui* v. *Janki Bibi* (2). Such being the distinction between a claim for surplus collections in a redemption suit and a claim for mesne profits in a suit in ejectment, the cases of *Mon Mohun Sirkar* v. *The Secretary of State for India* (3) and of *Ram Dayal* v. *Madan Mohan Lal* (4), which deal with the suits for mesne profits, have no bearing upon the case before me.

Maksud Ali v. *Nargis Dye* (5) and *Amanat Bibi* v. *Imdad Husain* (6) have also nothing to do with a suit for surplus profits brought after a suit for redemption.

It is contended on behalf of the respondent that article 105 of the Indian Limitation Act (No. XV of 1877) provides three years' limitation for the recovery of surplus collections received by the mortgagee from the date when the mortgagor re-enters on the mortgaged property, and that this indicates that there can be a separate suit for excess collections.

The article in my opinion contemplates a case other than that of redemption. When a mortgagor takes possession of the mortgaged property, not in execution of a decree for redemption, but in some other way, then article 105 applies. In *Baboo Gour*

(1) (1882) I. L. R., 8 Calc., 593.
(2) (1891) I. L. R., 19 Calc., 615.
(3) (1890) I. L. R., 17 Calc., 968.
(4) (1899) I. L. R., 21 All., 425.
(5) (1892) I. L. R., 20 Calc., 322.
(6) (1888) L. R., 15 I. A., 106.

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Kishen Singh v. *Sahay Fukeer Chund* (1) it was ruled that a suit for redemption does not debar the mortgagor from afterwards suing the mortgagee in possession for mesne profits payable between the date of suit and the execution of the decree for redemption. In that case the mortgagor, as has been observed by the learned judges in *Satyabadi Behara* v. *Harabati* (2), had sued under Regulation I of 1798, while the scheme of the Transfer of Property Act is quite different. For the reasons given above I would allow the appeal.

BY THE COURT.—The order of the Court is that the appeal be allowed. The order of the learned District Judge remanding the case under section 562 of the Code of Civil Procedure is set aside, and the decree of the Court of first instance is restored. The appellant will have his costs here and in the Court below.

Appeal decreed.

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March 12.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

WILAYATI BEGAM (PLAINTIFF) *v.* NAND KISHORE (DEFENDANT).*

Civil Procedure Code, section 244—Question relating to the execution, discharge or satisfaction of the decree—Contest between the holder of a decree for an undivided share of joint property and an auction purchaser pendente lite.

One Wilayati Begam obtained a decree for possession of a share in certain joint and undivided zamindari property, and this decree was executed so far as might be by delivery of formal possession. While the suit in which this decree was passed was pending, one Raghunath Das obtained a simple money decree against another co-sharer in the zamindari, and in execution thereof brought the property to sale and it was purchased by Nand Kishore. Nand Kishore got possession. Wilayati Begam applied for mutation of names in her favour, but was resisted by Nand Kishore, and accordingly instituted a suit against Nand Kishore praying for a declaration of her title as against him. *Held* that such a suit was not obnoxious to the prohibition contained in section 244 of the Code of Civil Procedure. *Gulzari Lal* v. *Madho Ram* (3) distinguished. *Jagan Nath* v. *Milap Chand* (4) and *Kino* v. *Rudkin* (5) referred to.

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* Appeal No. 53 of 1907 under section 10 of the Letters Patent.

(1) (1867) 7 W. R., 364.
(2) (1907) I. L. R., 34 Calc., 223.
(3) (1904) I. L. R., 26 All., 447.
(4) (1906) I. L. R., 28 All., 722.
(5) (1877) L. R., 6 Ch. D., 160.

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WILAYATI BEGAM v. NAND KISHORE.

The facts of this case are as follows:—

Musammat Wilayati Begam was entitled to an undivided share of the estate of one Nihali Begam consisting of a 16 biswansi zamindari share of a mahal and also sir land appertaining thereto. She brought a suit against Ali Sher Khan and others for recovery of this share, and on the 12th of December 1896 got a decree for possession. This decree was not put into execution until the 6th of December 1899. Formal possession was given in 1900. While this suit was pending, one Raghunath Das, who had obtained a simple money decree against Ali Sher Khan and the other defendants to the suit of Wilayati Begam, attached and sold the property in which Wilayati Begam was a share-holder, and at the auction sale the defendant, Nand Kishore, became the purchaser on the 20th of August 1895. In 1899 he got possession of the property so purchased. Wilayati Begam applied in the mutation department to have her name recorded in respect of her share, but Nand Kishore filed an objection and the objection was allowed. Thereupon Wilayati Begam instituted the present suit on the 25th of July 1904, praying for a declaration of her title to the share decreed to her in 1896.

The Court of first instance (Munsif of Etah) decreed the plaintiff's claim, but this decree was reversed on appeal by the Additional Judge of Aligarh, and on second appeal to the High Court, the plaintiff's appeal was dismissed on the ground that the suit was barred by section 244 of the Code of Civil Procedure. It was held that the case fell within the ruling in *Gulzari Lal* v. *Madho Ram* (1); that Nand Kishore was, as the purchaser in that case, the representative of the judgment-debtor within the meaning of section 244, and that the question raised was one relating to the execution of the decree, and that that question was only determinable by the Court executing the decree. Against this decree the plaintiff appealed under section 10 of the Letters Patent.

Maulvi *Abdul Majid*, for the appellant.

Mr. *G. W. Dillon*, for the respondent.

STANLEY, C.J., and BURKITT, J.—The facts of this case are fully set out in the judgment of the learned Judge of this Court from whose decision this appeal has been preferred. They

(1) (1904) I L. R. 26 All., 447.

are not complicated. The plaintiff Musammat Wilayati Begam was entitled to an undivided share of the estate of one Nihali Begam consisting of a 16 biswansi zamindari share of a mahal and also sir land appertaining thereto. She brought a suit against Ali Sher Khan and others for recovery of this share, and on the 12th of December 1896 got a decree for possession. This decree was not put into execution until the 6th of December 1899. Formal possession was given in 1900. While this suit was pending, one Raghunath Das, who had obtained a simple money decree against Ali Sher Khan and the other defendants to the suit of Wilayati Begam, attached and sold the property in which Wilayati Begam was a share-holder, and at the auction sale the defendant Nand Kishore became the purchaser on the 20th of August 1895. In 1899 he got possession of the property so purchased. The plaintiff appellant applied in the mutation department to have her name recorded in respect of her share, but Nand Kishore filed an objection and the objection was allowed. Thereupon the suit out of which this appeal has arisen was instituted on the 25th of July 1904.

The Court of first instance decreed the plaintiff's claim, but this decree was reversed on appeal, and on second appeal to this Court the learned Judge dismissed the appeal on the ground that the suit was barred by section 244 of the Code of Civil Procedure. He held that the case fell within the ruling in *Gulzari Lal* v. *Madho Ram* (1); that Nand Kishore was, as the purchaser in that case, the representative of the judgment-debtor within the meaning of section 244, and that the question raised was one relating to the execution of the decree, and that the question was only determinable by the Court executing the decree.

Now, was the question raised one relating to the execution of the decree? This is the important question. There is an aspect of the facts which does not appear to have been present to the mind of the learned Judge, and no doubt was not brought to his notice in argument. Musammat Wilayati Begam was entitled only to an undivided share of the property of Nihali Begam, and could not in her former suit obtain more than a

(1) (1904) I. L. R., 26 All., 447.

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decree declaring her title to that share. She could not in that suit have got more than formal possession. She could not obtain physical possession without instituting partition proceedings. The proceedings in execution in that suit, therefore, ended with the delivery of formal possession—*Jagan Nath* v. *Milap Chand* (1). Wilayati Begam having got formal possession in execution thereby exhausted all the remedies open to her in that suit. Physical possession could only be obtained by partition in the Revenue Court. Now let us see what was the position of Nand Kishore. He purchased the property in dispute *pendente lite*, that is, during the pendency of the suit of Wilayati Begam, and therefore became bound by the judgment which was obtained by the plaintiff against Ali Sher Khan and others. An alienation or assignment *pendente lite* is not permitted to affect the rights of other parties to a suit unless it disables the party who makes the alienation from carrying out the order of the Court, in which case the alienee or assignee must be brought before the Court. In the present case all that the plaintiff was entitled was a declaration of her title to her share in the estate of Begam, and there was no necessity to bring Nand Kishore, the purchaser *pendente lite*, before the Cou t. It was argued before us on behalf of the respondent that the plaintiff ought to have applied to have Nand Kishore added as a party and to have obtained a decree against him. But it appears to us that it was not obligatory on the plaintiff to make any such application. If she had made it, it would have rested in the discretion of the Court to grant or refuse the application. Now a grantee *pendente lite* cannot question the decree or any proceeding in the cause which from the nature of the suit and the relief prayed for might naturally result. The practice under the Judicature Act in England is similar in this respect to that prevailing in this country under the Civil Procedure Code, and in England the addition to the array of parties of a purchaser *pendente lite* is ordinarily not regarded as necessary—*Kino* v. *Rudkin* (2), also Daniel's Chancery Practice, 6th edn., p. 256. In view then of the fact that the plaintiff appellant in her former suit obtained all the relief to which she was entitled as a co-sharer in an

(1) (1906) I. L. R., 28 All., 722. (2) (1877) L. R., 6 Ch. D., 160, at p. 162.

undivided estate, and that she obtained formal possession of her share in execution of the decree passed in that suit, we do not think that the ruling in the case of *Gulzari Lal* v. *Madho Ram* (1) bars her right to maintain the present suit. When the defendant resisted her claim to have her name recorded as owner in respect of her share, she was, we think, justified in instituting the suit out of which this appeal has arisen, which is one in substance for the declaration of her title to a share as against the defendant, who in the mutation proceedings denied her title, thereby throwing a cloud on it. She cannot obtain proprietary possession of the share unless she takes partition proceedings, and in so far as the Court of first instance granted her a decree for proprietary possession, that decree cannot be upheld. We allow the appeal, set aside the decree of the learned Judge of this Court and also the decree in the lower appellate Court and decree the plaintiff's claim for a declaration of her title as claimed with costs in all Courts.

Appeal decreed.

Before Sir John Stanley, Knight, Chief Justice, and Mr. Justice Sir William Burkitt.

1908 *March* 13.

BALWANT SINGH AND ANOTHER (PLAINTIFFS) *v.* SHANKAR (DEFENDANT) *

Wajib-ul-arz—Construction of document—House tax—Cess—Rent.

Under the wajib-ul-arz of a village called Radhakund the zamindar was declared to be entitled to one *taka* (six pies) per month for every house from the occupants of the village and also from the owners of shops and temples. *Held* that this payment (which was called "gharghanna") was not a house-tax, or cess, but merely ground-rent and did not require special sanction.

THE plaintiff in the suit out of which this appeal arose was the zamindar of the village of Radhakund in the district of Muttra and the defendant occupied a house in the *abadi* of that village. The plaintiff sued to recover three years' rent of the house so occupied by the defendant. The suit was based upon the wajib-ul-arz of the village which provided that the zamindar was entitled to one *taka* (that is, 6 pies) per month for every house from the occupants of the village and also from the owners

* Appeal No. 68 of 1907 under section 10 of the Letters Patent, from a judgment of Griffin J., dated the 25th of July, 1907.

(1) (1904) I. L. R., 26 All., 447.

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of shops and temples. The defence set up by the defendant was that this rent had never been paid and was not leviable by the plaintiff.

The Court of first instance (Munsif of Muttra) decreed the plaintiff's claim, and this decree was affirmed on appeal by the Additional Subordinate Judge of Agra, the lower Court finding that the alleged custom was proved. On second appeal, these decrees were set aside by a single Judge of the High Court, and the plaintiff's suit dismissed, upon the ground that the payment claimed was in the nature of a cess, and, being unauthorized, was not legally recoverable. From this decree the plaintiff appealed under section 10 of the Letters Patent.

Babu *Jogindro Nath Chaudhri*, for the appellants.

Lala *Kedar Nath*, for the respondent.

STANLEY, C.J., and BURKITT, J.—The plaintiff appellant is the zamindar of the village of Radhakund in the district of Muttra and the defendant occupies a house in the *abadi* of that village. The claim of the plaintiff is to recover three years' rent of the house so occupied by the defendant. Under the wajib-ul-arz of the village the zamindar is declared to be entitled to one *taka*(that is, 6 pies) per month for every house from the occupants of the village and also from the owners of shops and temples. The defence set up by the defendant was that this rent had never been paid and was not leviable by the plaintiff. The Court of first instance decreed the plaintiff's claim and this decree was affirmed on appeal, the lower Courts finding that the alleged custom was proved. On second appeal, however, the learned Judge of this Court allowed the appeal, reversed the decision of the Courts below and dismissed the plaintiff's suit.* The judgment is largely based on the meaning of the word *"gharghanna"* which is used in the wajib-ul-arz as descriptive of the money payable to the zamindars in respect of houses in the village. The learned Judge observes that the word *"gharghanna"* is understood to be a house-tax. For this no authority is cited. He also states that the contention on behalf of the defendant was that a house-tax is a cess, and that before a zamindar can recover a cess, it must first find a place in the list prepared by

* See Weekly Notes, 1907, p. 247, *s. v.* Shankar *v.* Balwant.

the Settlement Officer and be sanctioned by the Local Government as provided for by section 66 of Act No. XIX of 1873. The learned Judge then refers to section 56 and section 86 of the Land Revenue Act, III of 1901, and holds that, reading these two sections together, it was the intention of the Legislature that no demands apart from rent by a landlord against tenants should be recognized in the Civil Courts which had not been recorded by the Settlement Officer and sanctioned by the Local Government as regular cesses. Now in the first place we may point out that the only rent demanded by the zamindar in respect of the occupation of houses in the abadi of the village is this charge of half an anna per month. No other rent is payable. Section 56, therefore, has no application, because it refers to cesses which are payable by tenants in addition to the rent paid by those tenants. The charge in question is not a charge in addition to any rent. It is in fact the rent paid in respect of the site upon which the house of the occupier stands, or in other words a ground rent. Section 86 has also, we think, no application, for this reason, that the reservation sanctioned by the wajib-ul-arz of a monthly payment is the reservation of a ground rent and not a cess within the meaning of the Revenue Act. We think that the learned Judge of this Court was wrong in the interpretation which he put upon the word "*gharghanna*" as used in the wajib-ul-arz, and that that word means nothing more than the rent payable in respect of the houses in the abadi of the village and is in no sense a house-tax or cess, as laid down by him. We therefore allow the appeal, set aside the decision of the learned Judge of this Court and restore the decree of the lower appellate Court with costs in all Courts.

Appeal decreed.

1908
March 13.

Before Mr. Justice Sir George Knox.

KHIALI RAM (PLAINTIFF) *v.* HIMMATA AND OTHERS (DEFENDANTS).*

Act No. III of 1877 (*Indian Registration Act*), *section* 50—*Mortgage—Sale of property comprised in an unregistered mortgage—Liability of purchaser —Notice.*

Property was purchased which was the subject of an unregistered mortgage, the registration of which was not compulsory. The purchaser had no notice of the mortgage at the time of execution of the sale-deed in his favour, but received notice before the sale-deed was registered. *Held* that the mortgage was binding on the purchaser. The principle of *Diwan Singh* v. *Jadho Singh* (1) and *Bhikhi Rai* v. *Udit Narain Singh* (2) applied.

THE facts of this case are as follows:—

One Khiali Ram was the holder of an unregistered mortgage-deed, dated the 27th of January 1895. The deed was one the registration of which was not compulsory under the Indian Registration Act. He sued the obligors of the deed to recover the money due under his deed and in default to bring to sale the property hypothecated in the deed. He also added to the suit as a party one Bhoja, who had purchased the same property under a sale-deed, dated the 8th of February 1905, but not registered until the 7th of April 1905. The Court of first instance (first Additional Munsif of Meerut) dismissed the claim, and the lower appellate Court (Additional District Judge) on appeal arrived at the same finding. It held that there was no evidence to show that the respondent, Bhoja, had any knowledge of the plaintiff's mortgage on the date of the sale; but it further found that a notice was served on Bhoja after the execution of the sale-deed, but before its registration. The lower appellate Court held that as there was no evidence to show that the respondent, Bhoja, had notice on the date he got the sale-deed executed, he was not bound to pay the amount of the mortgage. The plaintiff appealed to the High Court.

Munshi *Gulzari Lal*, for the appellant.

Babu *Surendra Nath Sen*, for the respondents.

KNOX, J.—This second appeal arises out of a suit brought by Khiali Ram. Khiali Ram is a holder of an unregistered

* Second Appeal No. 3 of 1907, from a decree of Muhammad Ahmad Ali Khan, Additional Judge of Meerut, dated the 20th of September, 1906, confirming a decree of Ram Chandra Chaudhri, Additional Munsif of Meerut, dated the 6th of January, 1906.

(1) (1896) I. L. R., 19 All., 145. (2) (1903) I. L. R., 25 All., 366.

mortgage-deed, dated the 27th of January 1895. The deed was one the registration of which was not compulsory under the Indian Registration Act. He sued the obligors of the deed to recover the money due under his deed and in default to bring to sale the property hypothecated in the deed. He also added to the suit as a party one Bhoja, who had purchased the same property under a sale-deed, dated the 8th of February 1905, but not registered until the 7th of April 1905. The Court of first instance dismissed the claim and the lower appellate Court on appeal arrived at the same finding. It held that there was no evidence to show that the respondent Bhoja had any knowledge of the plaintiff's mortgage on the date of the sale, but it further found that a notice was served on Bhoja after the execution of the sale-deed, but before its registration. The lower appellate Court observed further that as there was no evidence to show that the respondent Bhoja had notice on the date he got the sale-deed executed, he was not bound to pay the amount of the mortgage. In appeal it is contended before me that the respondent Bhoja having received notice of the plaintiff's mortgage before the registration of the sale-deed in his favour the said respondent is bound by the same.

The learned vakil for the respondents takes his stand upon the provisions contained in sections 47 and 50 of the Indian Registration Act, and he cites in support of his position the principle laid down in *Hasha* v. *Ragho Ambo Gondhali* (1). He further drew attention to the case of *Santaya Mangarsaya* v. *Narayan* (2), likewise to the case of *Abdul Majid* v. *Muhammad Faiz-ullah* (3) and *Baldeo Prasad* v. *Baldeo* (4). None of these cases cited are exactly in point or on all fours with the present case.

On the other hand the principle laid down by my brother Aikman in *Diwan Singh* v. *Jadho Singh* (5), which was afterwards restated and affirmed in *Bhikhi Rai* v. *Udit Narain Singh* (6) is a principle which can without difficulty be extended to the circumstances of the present case. It is true

(1) (1881) I. L. R., 6 Bom., 165.
(2) (1883) I. L. R., 8 Bom., 182.
(3) (1890) I. L. R., 13 All., 89.
(4) Weekly Notes., 1901, p. 112.
(5) (1896) I. L. R., 19 All., 145.
(6) (1903) I. L. R., 25 All., 366.

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that in neither of these the facts are exactly the same as the facts in the present case, but the principle that section 50 of the Indian Registration Act will not avail to the holder of a subsequently registered deed over an earlier deed not compulsorily registrable, if the holder of the registered deed at the time of the registration had notice of the earlier unregistered deed, is one, as I have already said, which can easily be extended to and covers the position of the parties in the case before me. At the time when Bhoja was informed by letter of the plaintiff's mortgage he had ample time to reconsider his position and to refuse to register the deed. He had notice of the previous transaction sufficient to put him on enquiry, and could have ascertained whether in taking the sale-deed he was or was not taking it subject to the incumbrance of 1895. The plea taken in appeal prevails. The appeal is decreed, the decrees of the Courts below are set aside, and as this decision is upon a preliminary point, upon which the Courts below have erred, the case will be returned to the Court below under section 562 of the Code of Civil Procedure with directions to re-admit it on its file of pending cases and dispose of it according to law. Costs here and hitherto will abide the event. *

Appeal decreed and cause remanded.

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March 14.

Before Mr. Justice Richards.

KHAIRATI (DEFENDANT) *v.* BANNI BEGAM (PLAINTIFF).†

Act No. IV of 1882 (*Transfer of Property Act*), *section* 85—*Mortgage—Suit for sale on a mortgage—Parties.*

Whether or not section 85 of the Transfer of Property Act, 1882, refers solely to persons interested in the equity of redemption, it is not essential to join as a party defendant in a suit for sale on a mortgage a person whose interest in the mortgaged property, if it exists, would be antagonistic to the claims of both mortgagor and mortgagee. *Jaggeswar Datt* v. *Bhuban Mohan Mitra* (1) referred to.

THE facts of this case are as follows :—

The defendant in the suit out of which this appeal arose—one Khairati—held a mortgage, dated the 10th of December,

* [Cf. also *Tejpal* v. *Girdhari Lal*, *supra* p. 130—Ed.]

† Second Appeal No. 23 of 1907, from a decree of D. R. Lyle, District Judge of Moradabad, dated the 3rd of December 1906, confirming a decree of Deoki Nandan Sahi, Munsif of Moradabad, dated the 7th of August 1905.

(1) (1906) I. L. R. 33 Calc., 425.

1895, from one Intizam Begam. On the 29th of August 1904, Khairati brought a suit for sale upon this mortgage and obtained a decree. When, however, he applied for execution of this decree, he was resisted by Musammat Banni Begam, the mother-in-law of Intizam Begam, who claimed the property mortgaged as her own. Banni Begam's objections having been disallowed, she brought the present suit under section 283 of the Code of Civil Procedure. The Court of first instance (Munsif of Moradabad) decreed the plaintiff's claim upon the ground that Khairati knew that Banni Begam claimed that Intizam Begam was a benamidar on her behalf, and that he was therefore bound to make her a party to the suit on his mortgage. In appeal this decision was upheld by the District Judge. Khairati thereupon appealed to the High Court.

Munshi *Gokul Prasad* (for whom Lala *Jang Bahadur Lal*), for the appellant.

The respondent was not represented.

RICHARDS, J.—Khairati, defendant in the present suit, brought a suit on the 29th August 1904 upon foot of a mortgage, dated the 10th December 1895, whereby Intizam Begam mortgaged the property, the subject matter of the present suit, to him. He only made his mortgagor Intizam Begam, a defendant to the suit. A decree was obtained, but when Khairati applied for execution the property was claimed by Banni Begam, the mother-in-law of Intizam Begam. The present suit was then instituted by Banni Begam under the provisions of section 283 of the Code of Civil Procedure. The Courts below have decided the suit in favour of Banni Begam on the simple ground that Khairati knew that Banni Begam claimed that Intizam Begam was benamidar for her, and that he was bound to make her a party to the suit he brought on foot of his mortgage. I have only to consider whether the lower Courts were justified in decreeing Banni Begam's suit without coming to any finding whether or not the property was really the property of the plaintiff, or on any other issue arising in the case. Section 85 of the Transfer of Property Act provides that in a mortgage suit, all persons having an interest in the property comprised in the mortgage must be made parties. In the present suit, no doubt, Khairati knew that Banni Begam

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claimed the property. Her claim, however, was adverse to both mortgagor and mortgagee. Khairati could not admit her claim. To do so would be fatal to his mortgage and the suit on foot thereof.

In the case of *Jaggeswar Dutt* v. *Bhuban Mohan Mitra* (1) it was held that adverse claimants ought not to be made parties to a mortgage suit for the purpose of litigating their titles, and that the only proper parties to such a suit are persons interested in the equity of redemption. In a carefully considered judgment, Mookerjee, J., gives many cogent reasons for such a proposition. In the present appeal it is unnecessary for me to decide that Khairati's suit would have been bad had he joined Banni Begam as a party, but the Courts below have held that his suit was bad because he did not join her as a defendant.

I certainly agree with the learned Judges who decided the case I have cited that as a general rule it would be highly inconvenient to allow adverse titles paramount to that of the mortgagor and mortgagee to be litigated in a mortgage suit. To do so would cause the greatest confusion. Section 45 of the Code of Civil Procedure provides that when causes of action are joined which the Court considers cannot be conveniently tried or disposed of together it may order separate trials or any other order that may be necessary or expedient. Possibly this enactment is sufficient and a suit is not actually bad because an adverse claimant is made a party. I am, however, clearly of opinion that the suit of Khairati on his mortgage was not bad because he did not make Banni Begam a defendant, and this is the only matter necessary for decision in the present appeal. No one appears on behalf of the respondent.

I allow the appeal, set aside the decrees of both the Courts below and remand the case under section 562 of the Code of Civil Procedure to the Court of first instance through the lower appellate Court with directions to readmit the suit under its original number in the register and dispose of it according to law. The costs will be dealt with by the Court finally disposing of the case.

Appeal decreed.

(1) (1906) I. L. R., 33 Calc., 425